Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1994

MALONE & HYDE, INC.

Petitioner,

versus

GENERAL DRIVERS, SALESMEN AND WAREHOUSEMEN'S LOCAL UNION NO. 984, an Affiliate of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AFL-CIO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where, in a union's action to compel an employer to arbitrate with an attorney-represented former employee, the employer challenged arbitrability upon the grounds, *inter alia*, (i) that the arbitration clause of the collective-bargaining agreement (CBA) empowered an arbitrator to decide cases only upon the express language of the CBA and the CBA expressly allowed only union-prosecuted grievance arbitration; (ii) that the employee, in his separate written agreement with the union upon which the union continued to rely, had rejected its representation and released the union from any obligation to process his complaint; and (iii) that the union had lost bargaining representative status and the CBA itself had terminated, was it proper for the court, after refusing to require the employer to arbitrate with the employee, then to enjoin the employer to permit an arbitrator rather than the court to determine whether the employer is nevertheless required to arbitrate with the non-incumbent union over the substance of the employee's complaint?

2. Where an employer challenged arbitrability on the grounds, *inter alia*, that any obligation to arbitrate must arise from the arbitration clause of the collective-bargaining agreement (CBA) which empowered an arbitrator to decide cases only upon the express language of the CBA and that the CBA expressly provided that no rights or obligations created by or arising out of the CBA extended beyond its termination, was it proper for the court, after termination of the CBA, nevertheless to enjoin the employer to permit an arbitrator rather than the court to determine whether any arbitration obligation exists?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No.

MALONE & HYDE, INC.[1]

Petitioner,

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GENERAL DRIVERS, SALESMEN AND WAREHOUSEMEN'S LOCAL UNION NO. 984, an Affiliate of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AFL-CIO

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is officially reported at 23 F.3d 1039 and appears in the appendix to this petition.

JURISDICTION

The decision of the court of appeals was filed on May

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[1] Pursuant to Rule 29.1, Petitioner states that Fleming Companies, Inc. is its parent.

11, 1994. A petition for rehearing and rehearing en banc was denied on June 23, 1994 (Pet. App. A-1, A-24), and pursuant to Rule 13.4, this Petition for Writ of Certiorari is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This case arises from an employment dispute involving Richard Mack, his former employer, Malone & Hyde, Inc. ("Malone & Hyde" or "the Employer") and a union. In the early months of 1988, Malone & Hyde suspended and later terminated Mack's employment. Mack was a member of a bargaining unit then exclusively represented by General Drivers, Salesmen and Warehousemen's Local No. 984 ("the Union"). On both occasions, Mack signed a record of grievance, which the Union submitted as a grievance to the Employer. At the time of Mack's

grievances, the Employer and the Union were parties to a collective-bargaining agreement ("CBA"). The CBA in effect at the time of Mack's complaints expired on January 8, 1989, and a subsequent agreement expired on January 8, 1992. In November 1991, the Employer withdrew recognition of the Union.[2] The Union subsequently filed a petition seeking an election, and the Union lost the election in May 1992.

The grievance and arbitration clause of the CBA set out procedures for filing and resolving grievances. The Union and the Employer processed Mack's grievances according to the CBA up to arbitration but were unable to resolve the grievances at the pre-arbitration phases. The Union requested that Mack's grievances be arbitrated. Mack, however, did not want the Union agent representing him at the arbitration and requested that he be represented by an attorney. The Union denied Mack's request for an attorney but assigned a different Union agent, Arthur B. Crutcher.

In August 1988, a private attorney notified the Union that she represented Mack with regard to arbitration. A month later, that attorney again notified the Union that she represented Mack and asked to be included in the selection of the arbitrator. Crutcher subsequently received a letter from Mack notifying him that Mack had hired the attorney to represent him in the arbitration and requesting that the Union forward all information to his attorney. In response to Mack's letter, Crutcher wrote Mack a letter in

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[2] That action, based on a demonstration that the Union lacked majority support, was found legally valid by the National Labor Relations Board.

which he requested "specifically if you are disbarring the Local Union from presenting your cases and will only use officials of the Local Union as witnesses to testify." Crutcher also asked that Mack sign the letter "releasing the Local Union of all of its duties, requirements and obligations under the terms and provisions of the present contract with Malone & Hyde Company."

On November 16, 1988, Mack signed the release which stated:

> I, Richard Mack, do hereby release Teamsters Local Union No. 984 of all of its duties, requirements and obligations under the terms and provisions of the present contract with Malone & Hyde Company concerning my cases.

In late November, Malone & Hyde's operations manager received a call from Crutcher advising him that Mack had retained outside counsel and that the Union was "out of it."

The American Arbitration Association ("AAA") previously had furnished panels of arbitrators to representatives of the Union and the Employer for the selection of arbitrators to hear the suspension and discharge cases. Receiving no response, the AAA again wrote the Union and Employer in early December, 1988, subsequent to the time Mack had retained a private attorney and released the Union. Malone & Hyde's operations manager then wrote the Union to seek clarification of the status of the cases in order to respond definitely to the AAA. In the meantime, Mack had filed an unfair labor practice charge against the

Union with the National Labor Relations Board ("NLRB") alleging bad faith by the Union in representing him. On January 12, 1989, about two weeks *after* Mack filed his NLRB charge, an attorney for the Union responded by letter to the Employer stating that no action of the Union was to be construed as an "abandonment" of Mack's grievances or as acknowledging that the grievances had no merit. The letter stated:

> On the contrary, *Mr. Mack desires to proceed to arbitration.* He simply did not want a Union business agent represnting him at the hearing. *He has relieved the Union of any further obligations in the processing of his grievances and has retained an attorney, Ms. Kim G. Sims.*

(Emphasis added.)

In January, 1989, Mack's personal attorney also wrote to Malone & Hyde to inquire about the grievance hearing. The Employer's attorney responded that individual employees had no right to arbitrate under the CBA, and therefore the company declined to deal with her as a representative of Mack. Malone & Hyde wrote the AAA on February 2, 1989, advising that because the Union had been relieved of any further obligation to process Mack's grievances, Malone & Hyde was relieved of any obligation to proceed further in those cases. The AAA subsequently notified the Union and the Employer that the AAA would consider the matter closed unless there was an objection by February 14. Having received no objection by February 20, the AAA wrote the Union and the Employer on that date stating that the AAA considered the matter withdrawn.

More than a month later, on April 5, 1989, the Union's attorney wrote the AAA claiming that he personally had not received a copy of the AAA's February 20, 1989 letter sent to a Union official and the company. The Union's attorney advised that "[t]he grievant desires to have his own attorney process his grievance and the grievant and the Union have agreed. The company has declined to arbitrate with the grievant's personal attorney." In the meantime, the NLRB had already issued a complaint against the Union based on Mack's charge against the Union. On April 10, 1989, the Union filed its answer to the NLRB complaint, affirmatively defending on the basis that Mack had released the union of any duty to represent him:

> *Mr. Mack had advice of his own counsel before signing.* It was deemed necessary before *surrendering to private counsel the responsibility for processing to a conclusion a grievance* the Union felt it was better trained, more experienced, and prepared to handle.

(Emphasis added.)

Two days after filing its answer in the NLRB case, the Union buttressed its defense by filing the present action on May 12, 1989, against the Employer under 29 U.S.C. §185, requesting the district court either to compel the Employer to arbitrate with Mack and Mack's attorney or to decide the merits of Mack's complaints.[3] On October 8, 1991, the district court denied the Union's motion for

[3]As a result, the NLRB then indefinitely postponed its case pending resolution of the court action. To date, the NLRB has not heard the case.

summary judgment; the court concluded that an employer has no duty to arbitrate a grievance with an individual employee and his personal attorney but found that an issue of fact existed as to whether the Union still represented Mack and whether the release signed by Mack constituted a formal rejection of Union representation.[4]

After a hearing on April 20, 1992, the district judge issued his decision from the bench the following day. The judge dismissed the Union's complaint, deciding that Malone & Hyde acted properly in refusing to arbitrate with Mack and his attorney. The court found that the Union was not entitled to choose to allow Mack to arbitrate with his own attorney. The court reasoned that, because Mack was not a party to the CBA, he could not be a party to arbitration, and that any processing of Mack's grievances must be carried out by the Union "with the permission of Mr. Mack without delegation of that function to Mr. Mack or his attorney." In an order amending the judgment, the court clarified that the Employer was, nevertheless, enjoined to proceed to arbitration with the non-incumbent Union concerning Mack's complaints.

The district court declined to rule on the legal effects of the release signed by Mack, the Union's continuing reliance on that release, the turning over of Mack's complaints to Mack and his personal attorney, the Union's loss of bargaining representative status, and the termination of the CBA, apparently believing that an arbitrator and not the court must decide those questions. The judge did not

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[4] As noted below, however, the district court never subsequently resolved those questions.

address the Employer's contention that the arbitration clause itself specifically limited an arbitrator's power to deciding cases only upon the *express* language of the CBA, so that an arbitrator would lack power to rule on those issues. Nor did the court address the contention that any arbitration obligation had to arise (if at all) under the arbitration clause of the CBA, and the CBA expressly provided that all obligations arising under it terminated with the termination of the CBA; therefore, contended the Employer, only a court, and not an arbitrator, could decide whether the Employer was obligated to arbitrate after contract termination.

On appeal, a divided panel of the Sixth Circuit found that the construction and effect of Mack's release of the Union "involves a question of the application of the CBA and is properly left for arbitration." Similarly, the court opined that "the Union's loss of representative status, and the termination of the CBA raises issues involving interpretation of various provisions of the CBA." The court of appeals succinctly stated what it believed to be the determinative principle as follows: "*These claims require examining the terms of the CBA itself and are, therefore, arbitrable.*" (Pet. App. A-14) (Emphasis added.)

As to the effect of the contract termination, the court of appeals recognized that in *Nolde Brothers,* the Court had stated that the bargaining parties can expressly or by clear implication in the CBA provide for arbitration obligations to cease upon termination of the CBA. However, despite the fact that the district court had not addressed the issue at all and made no factual findings or rulings concerning the meaning, history and significance of the specific ter-

mination provisions upon which the Employer relied, the Sixth Circuit concluded that the Employer's argument was "unpersuasive" because it would be inconsistent with the general policy favoring arbitration.

The dissent, noting that the arbitration clause significantly delimited the scope of an arbitrator's powers "*to decide the case upon the express language of this Agreement,*" concluded that the issues raised by the Employer could not be determined by reference to the CBA; therefore, the dissenting judge would remand the case to the district court for resolution of those issues.

ARGUMENT

A. A writ should be granted because the court of appeals has decided federal questions of arbitrability in a way that conflicts with applicable decisions of this Court.

1. In holding that Petitioner's asserted challenges to arbitrability "require examining the terms of the CBA itself and are, therefore, arbitrable," 23 F.3d at 1045, the court of appeals based its decision on a rationale that directly conflicts with applicable decisions of this Court. In *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964), the Court stated:

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.

376 U.S. 546-47 (quoting *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)).

This Court has specifically rejected the circuit's view that an arbitrator, rather than a court, must decide an arbitrability issue where decision of that issue requires interpretation of the collective-bargaining agreement. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 208-09 (1991). "[W]e must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement." *Id.* at 209.

In *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 651 (1986), the Court held that whether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to "arbitate the arbitrability issue." Held the Court, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." 475 U.S. at 649.

In this case, the Employer contended that as a matter of law it had no duty to arbitrate with the Union concerning the substance of Mack's complaints, because Mack and the Union had a separate agreement releasing the Union from any duty or responsibility for prosecuting his complaints, and that the Union's continuing conduct was consistent with its openly announcing to the Employer that the Union was "out of it." Both in a separate NLRB case and in the district court action itself, the Union con-

tinued to rely on the fact that it had been released from any obligation to represent Mack; significantly, the Union's present suit was actually directed at forcing the Employer to arbitrate directly with Mack and his personal attorney.

Even after the bargaining relation itself had ended and there was no contract in force, the Union made no claim that it (and not Mack or Mack's attorney) represented Mack; to the contrary, the Union adhered to its position and argued that the Employer must arbitrate with Mack individually. The dissenting judge below correctly recognized that the effects of the release agreement and this conduct were *not* matters that an arbitrator was empowered to decide based on the "express language of this Agreement."

2. Similarly, the circuit's decision conflicts with this Court's decision in *United States Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960), where the Court stated: "The grievance procedure is, in other words, a part of the continuous collective bargaining process." In the present case, the Union entered an agreement with Mack that the union did *not* represent him in his dispute, and thereafter the Union lost all bargaining representation rights. Requiring the Employer in this circumstance to arbitrate with the non-incumbent Union concerning a dispute with an employee who was already proceeding on his own is bizarre and completely at odds with the concept of arbitration as a form of collective bargaining. Nevertheless, the court of appeals leaves that critical issue—whether the Employer was required to engage in any form of collective bargaining with the Union, including specifically arbitration—to an arbitrator for decision, although an

arbitrator would be limited to the express provisions of the now-terminated contract. Not even the Union has argued that the parties had "clearly and unmistakably" agreed to arbitrate such an issue. *See AT&T,* 475 U.S. 649.

3. Likewise, the decision of the court of appeals directly conflicts with *Nolde Brothers, Inc. v. Bakery & Confectionery Workers Union, Local 358,* 430 U.S. 243 (1977), where this Court carefully *reviewed contract provisions* in order to determine whether arbitration obligations terminated with the contract's expiration. In addressing this issue in the present case, the court of appeals focused on general policies favoring arbitration, again purposefully avoiding decision on whether the specific arbitration and temination language relied upon by the Employer revealed an intent that all arbitration obligations (even those previously) would terminate with the contract. Yet, *Nolde Brothers* specifically recognized that the bargaining parties can expressly or by clear implication provide that arbitration obligations cease upon termination of a contract. Moreover, the contract parties are free to make any contract they wish so long as it does not violate the law. The appellate court here simply imposed its own view as to what it believed labor contracts generally should provide in order to promote arbitration.

Here, the CBA limited an arbitrator's power to deciding cases upon the express language of the CBA and contained unusually strong termination language expressly providing that "no obligation" created by or arising under the CBA could "extend" beyond termination of the CBA. The district court declined to rule on the issue. No

findings were made as to the history, meaning or significance of these particular provisions. In such a case, this Court's decision in *AT&T Technologies, supra*, teaches that the issue should have been decided by the district court in the first instance and reviewed by the court of appeals; it cannot be avoided or referred to an arbitrator who lacks power to determine his own jurisdiction.

B. A writ should be granted because the decision of the court of appeals concerning arbitrability of issues arising from separate agreements and conduct of parties creates a conflict between the circuits and involves an important question of federal law which has not been, but should be, decided by this Court.

Unlike the Second Circuit's decision in *Peerless Importers, Inc. v. Wine, Liquor & Distillery Workers, Union Local One,* 903 F.2d 924 (2d. Cir. 1990), and *Rochdale Village, Inc. v. Public Service Employees Union, Local 80,* 605 F.2d 1290 (2d. Cir. 1979), the Sixth Circuit in the instant case held that regardless of whether the release signed by Mack constituted a "collateral agreement," the construction of that release involved a question for an arbitrator, not the court. The dissent, however, noted that an arbitrator, delimited by the CBA to its express provisions, could not determine the legal effects of the release agreement and the conduct of Mack and the Union arising from that agreement.

While the circuit acknowledged that Malone & Hyde contended that the release agreement and conduct meant that the company as a matter of law had no obligation to deal with the Union, neither the district court nor the cir-

cuit attempted to decide that legal issue. How could an arbitrator, limited to the express provisions of the CBA, decide whether the release agreement, as a matter of federal labor law, absolved the Employer of any obligation to deal with the Union?

At least one other circuit has recognized that conduct by a party outside of the grievance procedure itself can constitute a non-arbitrable defense to arbitration. *See Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado,* 535 F.2d 598 (10th Cir. 1976). Here, however, the Sixth Circuit rejected the possibility that the Union's reliance on the release agreement and conduct in both a separate NLRB proceeding and in the *judicial* proceeding before the district court was the type of non-arbitrable matter that could provide a complete bar.

Given the facts that the Union had solicited Mack's release agreement, had informed the Employer that the Union was "out of it," had forwarded the release agreement as an affirmative defense in a separate NLRB proceeding, and had continued to rely on that release even as it requested the district court to compel the Employer to arbitrate with Mack and his personal attorney, a very strong argument can be made that a non-incumbent union should not be allowed as a "fall back" position to invoke the equitable powers of a federal court to compel the Employer later to deal with the Union over the substance of Mack's complaints. By granting a writ, this Court can resolve the apparent tension between the decisions of the Second, Tenth and Sixth Circuits and decide an important federal question which has not been, but should be, decided by this Court.

CONCLUSION

Wherefore, Petitioner prays that a writ of certiorari be granted and that the decision of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted this 17th day of September, 1994.

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APPENDIX A

GENERAL DRIVERS, SALESMEN AND WAREHOUSEMEN'S LOCAL UNION NO. 984, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Plaintiff-Appellee,

v.

MALONE & HYDE, INC.,
Defendant-Appellant.

No. 92-6505

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 30, 1993.

Decided May 11, 1994,

Rehearing and Suggestion for Rehearing En Banc Denied June 23, 1994,*

Union filed suit against employer alleging that refusal to arbitrate member's grievances violated collective bargaining agreement. Union moved for summary judgment. The United States District Court for the Western District of Tennessee, Jerome Turner, J., ruled that employer had no duty to arbitrate grievance with individual employee and that remaining issues were to be determined by arbitrator. Union appealed. The Court of

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* Judge Churchill would grant rehearing for the reasons stated in his dissent.

Appeals, Siler, Circuit Judge, held that whether member's release of union, union's loss of representative status, and termination of collective bargaining agreement relieved employer of obligation to arbitrate grievances with union were arbitrable matters.

Affirmed.

Churchill Senior District Judge, concurred in part, dissented in part, and filed opinion.

Howard R. Paul (argued & briefed), Memphis, TN for plaintiff-appellee.

David P. Jaqua (argued & briefed), Kullman, Inman, Bee, Downing & Banta, Memphis, TN, for defendant-appellant.

Before: BOGGS and SILER, Circuit Judges; and CHURCHILL, Senior District Judge.*

SILER, Circuit Judge, entered the opinion of the court, in which BOGGS, Circuit Judge, joined. CHURCHILL, Senior District Judge (P. 1046), delivered a separate opinion concurring in part and dissenting in part.

SILVER, Circuit Judge.

This case arises from an employment dispute involving Richard Mack, his former employer, Malone & Hyde, Inc. ("Malone & Hyde" or "the Employer"), and Mack's union. Defendant, Malone & Hyde, appeals the decision of the district court leaving questions of abandonment,

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* The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

withdrawal, estoppel, and waiver to be resolved by arbitration, should the parties proceed to arbitration.

For the reasons stated below, we affirm the decision of the district court.

I.

On January 28, 1988, Malone & Hyde issued a notice of discipline to Richard Mack, placing him on a two-week suspension. Mack was a member of the bargaining unit exclusively represented by Plaintiff, General Drivers, Salesmen, and Warehousemen's Local Union No. 984 ("the Union"). On February 29, 1988, Mack received an employee disciplinary notice terminating his employment. On both occasions, Mack signed a record of grievance, which the Union submitted as a grievance to the Employer. At the time of Mack's grievances, the Employer and the Union were parties to a collective bargaining agreement ("CBA"). The CBA in effect at the time of Mack's grievances expired on January 8, 1989, and a subsequent agreement expired on January 8, 1992. In November 1991, the Employer withdrew recognition of the Union. The Union subsequently filed a petition seeking an election. The Union lost the election in May 1992.

Article XIII of the CBA sets out the procedures for filing and resolving grievances. Article XIII provides for arbitration where the representatives of the Employer and the Union cannot reach a settlement. The Union and the Employer processed Mack's grievances according to the CBA up to arbitration but were unable to resolve the grievances at any of the pre-arbitration phases.

The Union requested that Mack's grievances be arbitrated. However, Mack did not want the designated

Union agent representing him at the arbitration and requested that he be represented by an attorney. The Union denied Mack's request for an attorney by but assign a different Union agent, Arthur B. Crutcher, Vice President of the local Union, to represent Mack.

In August 1988, Kim G. Sims, an attorney, notified the Union that she represented Mack with regard to his arbitration hearing. On September 9, 1988, Sims again notified the Union that she represented Mack and asked to be included in the selection of the arbitrator. Crutcher subsequently received a letter from Mack on October 12, 1988, notifying him that Mack had hired Sims to represent him in the arbitration and requesting that the Union forward to Sims all information regarding his case. In response to Mack's letter, Crutcher wrote Mack, stating in part:

> Since you have made this request that Ms. Sims present your case, we are requesting specifically if you are disbarring the Local Union from presenting your cases and will only use officials of the Local Union as witnesses to testify.
>
> We therefore ask that you sign this letter releasing the Local Union of all of its duties, requirements and obligations under the terms and provisions of the present contract with Malone and Hyde Company.

At the bottom of Crutcher's letter to Mack, the following release language appeared:

> I, Richard Mack, do hereby release Teamsters Local Union No. 984 of all of its duties, requirements and obligations under the terms and provisions of the present contract with Malone & Hyde Company concerning my cases.

Mack signed the release on November 16, 1988. In late November, John Lane, Malone & Hyde's operations manager, received a call from Crutcher advising him that Mack had retained outside counsel and that the Union was "out of it."

In July 1988, the American Arbitration Association ("AAA") had furnished panels of arbitrators to the representatives of the Union and the Employer, who each selected separate arbitrators to hear the grievances. The AAA sent letters dated October 14, 1988, to the Union and the Employer acknowledging their selections of arbitrators. In late October and early November 1988, the AAA notified representatives of the Union and the Employer of dates the arbitrators would be available to hear Mack's grievances. Receiving no response, the AAA wrote the Union and the Employer in early December requesting information as to the current status of Mack's grievances. In order to respond to the AAA's request, John Lane of Malone & Hyde wrote the Union on December 28, 1988, seeking clarification of the status of Mack's grievances:

> You informed me recently that Teamsters Local Union No. 984 will not pursue [Richard Mack's] arbitration cases. Since that time, the American Arbitration Association, by letters dated

> December 6, 1988, has requested that we advise them of the status of the cases. In order that we may respond definitely to the AAA and close out these cases, please confirm below that the union will not pursue these cases further. Also, Malone & Hyde needs assurance that these cases will not be reinstituted by the Union and that all disputes and controversies between Malone & Hyde, Inc. and Teamsters Local Union No. 984 concerning the employment and termination of employment of Richard Mack are concluded.

Mack subsequently filed an unfair labor practice charge against the Union with the National Labor Relations Board ("N.L.R.B.") alleging bad faith on the part of the Union in representing him. On January 12, 1989, about two weeks after Mack filed his N.L.R.B. charge, Howard Paul, the Union's attorney, wrote the Employer stating that

> [n]o action of [the Union] is to be construed as an abandonment of Mr. Mack's grievances. Neither should they be construed as acknowledging that the grievance has no merit.
> On the contrary, Mr. Mack desires to proceed to arbitration. He simply did not want a Union business agent representing him at the hearing. He has relieved the Union of any further obligations in the processing of his grievances and has retained an attorney, Ms. Kim G. Sims[.]

On January 23, 1989, Sims wrote to Malone & Hyde to inquire about the grievance hearing. The Employer's attorney responded on February 2, 1989, asserting that

> [e]mployees have no individual right to arbitrate under the union contract. Only the union and the company have such a right. Moreover the company has no obligation to deal with any representative of Mr. Mack except the union, which by law is the representative of employees covered by the collective bargaining agreement. Therefore, the company declines to deal with you as a representative of Mr. Mack.

On February 2, 1989, Malone & Hyde also wrote the AAA stating that, based on the Union's notification that Mack did not wish for the Union to represent him with respect to his grievances and Malone & Hyde's understanding that the "union ha[d] been relieved of any further obligation to process [Mack's] grievances," Malone & Hyde was "relieved of any obligation to proceed further in these cases."

On February 7, 1989, the AAA notified the Union and the Employer that the AAA would consider the matter closed unless there was an objection by February 14, 1989. Having received no objections by February 20, 1989, the AAA wrote the Union and the Employer on that date stating that the AAA considered the matter withdrawn. On April 5, 1989, the Union's attorney wrote the AAA stating that he did not receive a copy of the February 20, 1989, letter and that he only became aware of that letter on March 25, 1989. The Union's attorney went on to state that the matter involving Mack's grievances

> ha[d] not been withdrawn and should proceed to arbitration. The grievant desires to have his own attorney process this grievance and the grievant and the Union have agreed. The company has declined to arbitrate with the grievant's personal attorney.

The AAA then requested comments from Malone & Hyde regarding the Union attorney's letter. Responding through its attorney, Malone & Hyde claimed that it had no obligation to arbitrate Mack's grievances.

On May 12, 1989, the Union filed suit against the Employer under 29 U.S.C. § 185 alleging that the Employer's refusal to arbitrate Mack's grievances violated the collective bargaining agreement. The Union requested the court to either compel the Employer to arbitrate or decide the merits of Mack's grievances. On October 8, 1991, the district court denied the Union's motion for summary judgment; the court concluded that an employer has no duty to arbitrate a grievance with an individual employee and his personal attorney but found that an issue of fact existed as to whether the Union still represented Mack and whether the release signed by Mack constituted a formal rejection of union representation.

A hearing was held on April 20, 1992, and on April 21, 1992, the district judge issued his decision from the bench. The judge dismissed the Union's complaint, deciding that Malone & Hyde acted properly in refusing to arbitrate with Mack or his attorney; the court held that Malone & Hyde "cannot be compelled to arbitrate with Mr. Mack or his attorney, either on their own or in conjunction with the Union's passive presentation of the grievances[.]" The district court found that the Union was not entitled to choose to allow Mack to participate with his own attorney. The court reasoned that, because Mack was not a party to the collective bargaining agreement, he could not be a party to the arbitration, and any further processing of Mack's grievances must be carried out by the Union "with the per-

mission of Mr. Mack without delegation of that function to Mr. Mack or his attorney." Finally, the district court determined that questions as to whether the Union withdrew from or abandoned the arbitration, whether the arbitration was time-barred,[1] and whether the employer had asserted valid equitable defenses are to be determined by the arbitrator.

II.

While the Union does not explicitly challenge the district court's decision that the Employer is obligated to arbitrate only with the Union, we will address the issue briefly.

[1] The district court, in denying the Union's request to compel the Employer to arbitrate with the individual employee and his privately retained counsel, looked to this court's decision in *Malone v. United States Postal Service,* 526 F.2d 1099 (6th Cir. 1975). *Malone* held that, in the absence of language in a CBA guaranteeing an employee the right to be represented in grievance and arbitration proceedings by someone other than the exclusive bargaining representative, an employer has no obligation to deal with an individual employee or any representative of the employee other than the exclusive bargaining representative. *Id.* at 1101. In the present case, the grievance and arbitration procedures set out in the CBA refer only to representatives of the union and the employer; nowhere is

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[1] Neither party challenges the decision of the district court leaving the question of whether the arbitration is time-barred to be determined by the arbitrator.

it stated that an individual employee can be party to either the CBA or an arbitration proceeding conducted pursuant to the CBA. Accordingly, the district court properly found that Malone & Hyde had no obligation to arbitrate directly with either Mack or his attorney.

III.

Malone & Hyde contends that the release signed by Mack, the turning over of Mack's grievances to Mack and his attorney, the Union's loss of representative status, and the termination of the CBA relieve Malone & Hyde of any obligation to arbitrate Mack's grievances with the Union.

[2] National labor policy favors arbitration, and where the parties to a collective bargaining agreement have agreed to submit to arbitration, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"), and the agreement, accordingly, contains an arbitration clause, there is a presumption of arbitrability. *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650, 106 S.Ct. 1415, 1419, 89 L.Ed.2d 648 (1986). This presumption can be overcome only if " 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' " *Id.* (quoting *Steelworkers v. Warrior & Gulf*, 363 U.S. at 582-83, 80 S.Ct. at 1353). The presumption favoring arbitration is based on a policy recognizing arbitration as a "substitute for industrial

strife," *Steelworkers v. Warrior & Gulf,* 363 U.S. at 578, 80 S.Ct. at 1351, and on the belief that arbitrators, more so than the courts, possess the proper experience and expertise to resolve labor disputes, *Litton Financial Printing Div'n v. NLRB,* 501 U.S. 190, —, 111 S.Ct. 2215, 2229, 115 L.Ed.2d 177 (1991) (Marshall, J., dissenting).

In the realm of industrial relations, it is not for the courts to weigh the merits of a grievance or to undertake to determine the rights of parties under a collective bargaining agreement, *AT & T Technologies,* 475 U.S. at 649, 106 S.Ct. at 1418; a court's role is limited to deciding if "the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564, 568, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403 (1960).

A.

[3] The district court made no finding as to the legal effect of the November 16, 1988, release signed by Mack, finding that the issue was procedural and, therefore, leaving the issue for arbitration. Malone & Hyde argues that construction of the release is properly the responsibility of a court as the agreement is collateral to the CBA. Malone & Hyde contends that the release, as a matter of law, relieved the Union of any obligation to process Mack's grievances. In Malone & Hyde's view, once the Union was released from its obligation to arbitrate, Malone & Hyde, as the other party to the CBA, was likewise released from any further duty to arbitrate. The Union contends that the district court properly left the question of interpreting the release to the arbitrator, arguing that the only purpose of

the release was to protect the Union should Mack later sue the Union. The Union further asserts that it "remains willing to go forward" with the processing of Mack's grievances.

Article XIII of the CBA contains a broad arbitration clause covering "any discharge, suspension, or dispute or controversy *of any kind* over the application of this Agreement." (Emphasis added). Such language is typical of broad arbitration clauses, *see Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 v. Interstate Distributor Co.*, 832 F.2d 507, 510 n. 2 (9th Cir.1987), and strengthens the presumption favoring arbitrability, *AT & T Technologies*, 475 U.S. at 650, 106 S.Ct. at 1419. *See also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550, 84 S.Ct. 909, 914, 11 L.Ed.2d 898 (1964).

The Employer posits that construction of Mack's signed release is properly the responsibility of a court as the agreement is collateral to the CBA. The Employer reasons that, because the release is collateral to the CBA, interpretation of the release does not depend on interpreting the CBA itself. However, this circuit has held that interpretation of a settlement agreement separate from an existing CBA is an issue properly left for arbitration. *Amalgamated Clothing Workers v. Ironall Factories Co.*, 386 F.2d 586 (6th Cir.1967).

Amalgamated Clothing Workers involved a separately negotiated settlement between the employer and the union settling particular grievances of specified individual employees. *Id.* at 588. The employer in *Amalgamated Clothing Workers* argued that the settlement resolved a

broader array of disputes than the issues specifically set out. *Id.* at 590. Noting that the parties had agreed to submit to arbitration "any complaint ... or dispute arising out of or relating to provisions of this Agreement, or the interpretation ... thereof," *id.* (quotation omitted), this court determined that construction of the settlement agreement "concern[ed] the correct interpretation to be accorded to the collective bargaining agreements between union and management" and was, consequently, a properly arbitrable issue, *id.*.

Whether or not the release signed by Mack constitutes a "collateral agreement," we find that construction of the release involves a question of the application of the CBA and is properly left for arbitration.[2] Similarly, Malone & Hyde's claim that it was no longer required to submit to arbitration by virtue of the Union's turning over of Mack's grievances to Mack and his attorney, the Union's loss of representative status, and the termination of the CBA raises issues involving interpretation of various provisions of the CBA. Therefore, resolution of this claim falls within the arbitrator's jurisdiction.[3]

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[2] In light of the reasoning in *Amalgamated Clothing Workers*, 386 F.2d at 590, it is unnecessary to classify this question as either "procedural" or "substantive."

[3] In support of its position, Malone & Hyde refers to two Second Circuit decisions, *Peerless Importers, Inc. v. Wine, Liquor & Distillery Workers, Local One*, 903 F.2d 924 (2d Cir.1990) and *Rochdale Village, Inc. v. Public Service Employees Union, Local 80*, 605 F.2d 1290 (2d Cir.1979), where the court held that agreements collateral to collective bargaining agreements were properly examined by the district court, not the arbitrator. We find neither of these authorities persuasive.

In *Peerless*, 903 F.2d at 929, the court held that an agreement set-

[4] Malone & Hyde contends that the district court should have determined, as a matter of law, whether the Union can require Malone & Hyde to arbitrate instead of leaving the matter to arbitration. Malone & Hyde notes language in the CBA stating that "[n]o rights or obligations created by or arising out of [the CBA] shall extend beyond its termination." Malone & Hyde argues that this provision, in light of the Union's loss of representative status and the termination of the CBA, means that the arbitrator no longer has jurisdiction over the matter.

As discussed above, these claims require examining the terms of the CBA itself and are, therefore, arbitrable.

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footnote 3 continued

tling a single labor dispute constituted a collateral agreement not to arbitrate and that construction of that agreement was properly for a court. However, the *Peerless* court concluded that the arbitration clause in the existing CBA did not cover the employee's grievance, *id.*; therefore, the only existing basis for arbitration was an oral agreement to arbitrate the particular claims of that one employee. The *Peerless* court specifically relied on the narrow scope of the arbitration agreement: "where an agreement [to arbitrate] is narrow, a court has greater leeway in determining whether the parties ended an agreement to arbitrate," *Id.* at 929. Here, in contrast, it is uncontested that the arbitration clause covers the subject matter of Mack's grievances.

Rochdale, 605 F.2d at 1296, involved the question of whether the parties to a collective bargaining agreement terminated the agreement. Addressing the question of whether the parties to a collective bargaining agreement had entered into a side agreement terminating the CBA and the precise terms of such a side agreement, the court held that such matters were beyond the scope of the particular arbitration clause involved and, therefore, properly evaluated by the court. *Id.* at 1297. The release signed by Mack does not concern termination of the entire agreement. Mack's release only concerns arbitration of Mack's grievances and is not collateral to the CBA because it relates directly to the CBA's arbitration and grievance provisions.

Furthermore, we note that the Supreme Court has recognized that a party's obligation to arbitrate does not automatically cease upon termination of the collective bargaining agreement. *Nolde Brothers, Inc. v. Bakery & Confectionery Workers Union, Local No. 358*, 430 U.S. 243, 252, 97 S.Ct. 1067, 1072, 51 L.Ed.2d 300 (1977); *International Brotherhood of Teamsters, Local No. 1199 v. Pepsi-Cola General Bottlers, Inc.*, 958 F.2d 1331, 1333 (6th Cir. 1992). The presumption that disputes *arising under a collective bargaining agreement* are arbitrable remains even after the CBA itself has terminated. *Litton, Financial Printing*, 501 U.S. at ____, 111 S.Ct. at 2225 (explaining *Nolde Brothers*, 430 U.S. 243, 97 S.Ct. 1067).

> A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Id. Applying this definition, Mack's grievances are clearly entitled to the presumption of arbitrability.

Malone & Hyde argues that the Court's decision in *Nolde Brothers* supports its contention that, as a matter of law, it is no longer bound by the arbitration clause. Malone & Hyde points out that the Court specifically stated that the parties to a collective bargaining agreement can expressly or by clear implication provide for arbitration obligations to cease upon termination of the CBA. *Nolde*

Brothers, 430 U.S. at 255, 97 S.Ct. at 1074. Malone & Hyde contends that, because the CBA itself provides that "[n]o rights or obligations created by or arising out of this Agreement shall extend beyond its termination," the parties have expressly negated any inference that the arbitration clause survives the contract's termination.

We find this argument unpersuasive. First, *Nolde Brothers*, 430 U.S. at 244, 97 S.Ct. at 1068, recognized the arbitrability of a dispute that actually arose *after* the collective bargaining agreement had terminated.[4] In contrast, the disputes underlying Mack's grievances arose in 1988, while the CBA was still in effect. As a result, the presumption set out in *Nolde Brothers* should be, if anything, even stronger where the dispute actually arose before the CBA expired.

Second, it is not obvious that the CBA's termination language covers grievance procedures that are ongoing when the agreement is terminated. It would be inconsistent with the policy favoring arbitration to summarily relieve the parties of the obligation to arbitrate where a dispute arose while the CBA was in effect and the resulting grievance procedure was initiated and well under way before either the CBA expired or the Union lost its representative status. *See General Drivers, Warehousemen and Helpers, Local No. 89, v. Moog Louisville Warehouse*, 852 F.2d 871, 874 (6th Cir.1988) (doubts as to whether a dispute is covered by arbitration clause should be resolved in favor of coverage).

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[4] Similarly, *Litton Financial Printing*, 501 U.S at ____, 111 S.Ct. at 2218, involved a dispute that occurred after expiration of the collective bargaining agreement.

IV.

[5] Among other issues, the district court left Malone & Hyde's claims of equitable and legal estoppel for resolution by the arbitrator in the event that the Union processed the arbitration. Malone & Hyde's contends that the district court should have addressed these defenses. The Union argues that Malone & Hyde's estoppel defenses are "procedural" questions to be addressed at arbitration.

Malone & Hyde contends that the union is estopped from seeking to require Malone & Hyde to arbitrate with the Union on the basis of positions taken by the Union in the present case and in Mack's separate N.L.R.B. action against the Union. The Employer claims that, in Mack's suit against the Union, the Union took the position that it had surrendered responsibility for processing Mack's claim to Mack and his attorney. Additionally, the Employer contends that, up to and including the trial in the instant case, the Union continued to request that the district court compel Malone & Hyde to arbitrate directly with Mack and his attorney.

The Supreme Court has found that, once it has been determined that the subject matter of a dispute is properly arbitrable, " 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons,* 376 U.S. at 557, 84 S.Ct. at 918. Here, the underlying dispute involves Mack's discharge and clearly presents an arbitrable issue. Therefore, Malone & Hyde's estoppel claims, which concern both procedural pre-requisites to arbitration and substantive provisions of the CBA, are properly left to arbitration. *See International Union of Operating Engineers, Local 150 v. Flair Builders, Inc.,* 406 U.S. 487, 92 S.Ct.

1710, 32 L.Ed.2d 248 (1972); *John Wiley & Sons,* 376 U.S. at 556-57, 84 S.Ct. at 918 ("Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.").

Malone & Hyde cites to our decision in *Amalgamated Clothing Workers,* 386 F.2d at 592, where this court determined that a claim of laches was a proper subject for court consideration. In so holding, we specifically found that "a decision on laches adds or subtracts nothing from the meaning of the agreement. Furthermore, consideration of the issue [of laches] in no way involves a consideration of the merits of the underlying substantive issue." *Id.* However, unlike the laches claim in *Amalgamated Clothing Workers,* 386 F.2d at 591-92, Malone & Hyde's estoppel defenses "grow out of the dispute and bear on its final disposition," *id.* at 591, and are, therefore, arbitrable.

The judgment of the district court dismissing the Union's complaint is AFFIRMED.

CHURCHILL, Senior District Judge, concurring in part and dissenting in part.

I concur in the majority opinion except in one major respect. It is my opinion that on the facts of this case, the issue of whether arbitration is barred by release, abandonment, withdrawal, waiver or estoppel is for the court and not the arbitrator to resolve.

The arbitration clause of the collective bargaining agreement in this case is significantly narrower than the arbitration clause at issue in *Amalgamated Clothing Workers v. Ironall Factories Co.*, 386 F.2d 586 (6th Cir.1967), Article XIII of the CBA does provide that "any discharge, suspension, or dispute or controversy of any kind over the application of this Agreement" shall be subject to the grievance process including arbitration. However, the final sentence in Article XIII delimits the scope of the arbitrator's powers: "the Committee of Arbitration is bound to decide the case upon the *express language of this Agreement* and shall not add to or alter the Agreement by interpretation." Article XIII; § 24 (emphasis added).

The issue of whether the conduct of Mack, his attorney, or the union has caused him to lose his right to have his grievance determined by arbitration cannot be determined by reference to the CBA. Furthermore, except with respect to the issue of time bar, the issue cannot be classified as a procedural issue. Procedural issues are defined as those which "involve claims by one of the parties that the other party has failed to follow the procedural conditions *specified in the collective bargaining agreement.*" *Amalgamated*, 386 F.2d at 591 (emphasis added).

In my opinion questions, other than time bar, which the district court ruled were determinable by the arbitrator cannot be resolved by reference to the CBA and therefore are not arbitrable. I would remand the case to the district court for resolution of these issues.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED
JUN 24 1992

GENERAL DRIVERS, SALESMEN, and WAREHOUSEMEN'S LOCAL UNION NO. 984, an Affiliate of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AFL-CIO,	)	
Plaintiff,	)	
VS.	)	No. 89-2398-TuBro
MALONE & HYDE, INC.	)	
Defendant.	)	

ORDER ON CROSS MOTIONS
TO ALTER OR AMEND JUDGMENT

Following trial of this case and the announcement of this court's decision, judgment was entered on May 14, 1992 dismissing the complaint and holding that the issues raised by the defendant of abandonment, withdrawal, estoppel, waiver and time bar are left for resolution by the arbitration. Both parties have now filed motions to amend the judgment.

Very briefly, this is a case where the union deferred to the employee's demands that he be allowed to have his own attorney represent him at the arbitration of a grievance that the union had made pursuant to the collective bargaining agreement with the employer. As a result, the employer refused to arbitrate with the employee and his attorney and the union filed this suit to compel arbitration.

The contract between the parties which provides for arbitration of grievances is stipulated, and no where in the pleadings is any issue made of the original contractual provision for arbitration. The issue drawn by the pleadings was whether the employer should be compelled to arbitrate with the employee and his attorney. The answer filed by the employer did raise a number of defenses concerning whether the employer's duty to arbitrate had been waived or time barred, whether the arbitration itself had been abandoned, withdrawn, and whether the union is estopped from arbitration by virtue of its conduct, but neither party has heretofore contested the existence of the contractual provision for arbitration. The court found that the contract of the parties provided for arbitration at Article XIII, § 24. The court held that the issues raised by the employer in its answer, as set out above, were issues that

properly should be submitted to the arbitrator for resolution.

The union now complains that the judgment provides "that the complaint is dismissed" whereas, it contends, the complaint has actually been sustained and judgment awarded to the plaintiff. The union argues that the court has actually ordered arbitration and should issue a mandatory injunction. The union points out that the Joint Pre-trial Order filed April 8, 1992 contains the following: "Plaintiff contends that, if Richard Mack is not entitled to have his attorney present, then the arbitration hearing should proceed with the union Representative representing the grievant."

The employer, on the other hand, now asserts that this court must decide whether "Defendant is obligated to proceed [to arbitrate] at all."

It was the court's understanding of the defendant's position that it acknowledged the contractual requirements for arbitration, but contended that the arbitration was no longer required because of abandonment, withdrawal, waiver, estoppel and time bar. These issues, the court ruled, are issues that should be presented to the arbitrator.

Apparently, however, the defendant employer contends that despite the contract and regardless of the future ruling of the arbitrator on the above mentioned defenses, it simply has no duty to arbitrate.

The court rules that the judgment should be amended to provide:

It is Ordered and Adjudged that,

The collective bargaining agreement legally obligates the union and the employer to arbitrate together the grievance, and the defendant is enjoined to proceed with the arbitration, provided, however that the employer is not compelled to arbitrate with Mr. Mack or his attorney.The issues raised by the defendant of abandonment, withdrawal, estoppel, waiver and time bar are issues properly determinable by the arbitrator upon resumption of the arbitration process, and are thereby not ruled on by this court.

IT IS SO ORDERED this 22nd day of June, 1992.

/s/ Jerome Turner

JEROME TURNER
UNITED STATES DISTRICT JUDGE

APPENDIX C

No. 92-6505

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 23 1994

GENERAL DRIVERS, SALESMEN, and WAREHOUSEMEN'S LOCAL UNION NO. 984, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,	)	
Plaintiff-Appellee,	)	
v..	)	ORDER
MALONE & HYDE, INC.	)	
Defendant-Appellant.	)	

BEFORE: BOGGS and SILER, Circuit Judges; and CHURCHILL, District Judge.*

* Hon. James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied, Judge Churchill would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk *se*

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 92-6505

GENERAL DRIVERS, SALESMEN, and WAREHOUSEMENS LOCAL UNION No. 984, an Affiliate of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS of AMERICA, AFL-CIO,

Plaintiff-Appellee,

v.

MALONE & HYDE, INC.

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PETITION OF MALONE & HYDE, INC. FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

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ARTICLE XIII

Grievance

23. **A written grievance concerning any discharge, suspension, or dispute or controversy of any kind over the application of this Agreement must be made by the Union to the Employer** within five (5) days after its occurrence, or same will be deemed to have been waived. Such grievance must set forth the facts relied upon, the clause or clauses alleged to have been violated and the relief sought.

24. . . .The decision arrived at pursuant to this procedure shall be final and binding upon the parties thereto, **but the Committee of Arbitration is bound to decide the case upon the express language of this Agreement and shall not add to or alter the Agreement by interpretation.**

(Emphasis added.)

ARTICLE XXX

Entire Agreement

83. It is agreed that all matters deemed by the parties to be proper subjects for collective bargaining between them are included in this contract, and during the term of this contract, including any extension term, no further or other matters shall be subject to further collective bargaining. **No rights or obligations created by or arising out of this Agreement shall extend beyond its termination.**

(Emphasis Added.)

Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

No. 94-533

In The

Supreme Court of the United States

October Term, 1994

MALONE AND HYDE, INC.,

Petitioner,

v.

GENERAL DRIVERS, SALESMEN, and WAREHOUSEMEN'S LOCAL UNION NO. 984, an Affiliate of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT, GENERAL DRIVERS, SALESMEN, AND WAREHOUSEMEN'S LOCAL UNION NO. 984, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO'S, BRIEF IN OPPOSITION

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STATUTES

29 U.S.C. § 185 6

No. 94-533

In The

Supreme Court of the United States

October Term, 1994

MALONE AND HYDE, INC.,

Petitioner,

v.

GENERAL DRIVERS, SALESMEN, and WAREHOUSEMEN'S LOCAL UNION NO. 984, an Affiliate of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

RESPONDENT, GENERAL DRIVERS, SALESMEN, AND WAREHOUSEMEN'S LOCAL UNION NO. 984, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO'S, BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

General Drivers, Salesmen, and Warehousemen's Local Union No. 984 ("Union") respectfully request this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of

Appeals for the Sixth Circuit officially reported at 23 F.3d 1039 (6th Cir. 1994).

ISSUE PRESENTED

Did the Court of Appeals err in ordering the Defendant to arbitrate the grievances of Richard Mack, with issues of alleged abandonment, withdrawal, estoppel, and waiver to be decided by the Arbitrator?

STATEMENT OF THE CASE

A. Material Facts.

The case at bar arises from an employment dispute involving Richard Mack, his former employer, Malone and Hyde, Inc. ("Malone and Hyde" or "Employer"), and the Union. Early in 1988, Malone and Hyde suspended and subsequently terminated Mack's employment. At the time, Mack was a member of the bargaining unit exclusively represented by the Union. Mack filed two (2) grievances pertaining to his discipline and termination and, on both occasions, the Union submitted the grievances to the Employer.

At the time the grievances were filed, Malone and Hyde and the Union were parties to a collective bargaining agreement ("CBA") that expired on January 8, 1989. A subsequent agreement expired on January 8, 1992. In November of 1991, Malone and Hyde withdrew recognition of the Union and, following the filing of a petition

seeking an election, the Union lost its representative status in May of 1992.

Article 8 of the CBA sets out the procedures applicable to the filing and resolution of grievances. Article 8 provides for arbitration in cases in which Malone and Hyde and the Union cannot reach settlement. The arbitrators are to be selected from panels requested from and furnished by the American Arbitration Association ("AAA").

AAA rules are set out in a publication, Voluntary Labor Arbitration Rules. The rules provide in part:

> 1. Agreement of Parties. The parties shall be deemed to have made these rules a part of their arbitration agreement whenever, in a collective bargaining agreement or submission, they have provided for arbitration by the [AAA] or under its rules.
>
> * * *
>
> 20. Representation by Counsel. Any party may be represented at the hearing by counsel or by another authorized representative.
>
> * * *
>
> 27. Arbitration in the Absence of a Party. Unless the law provides the contrary, the arbitration may proceed in the absence of any party who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

The Union and Malone and Hyde processed Mack's grievances according to the CBA to the point of arbitration, but were unable to resolve the grievances at the pre-arbitration phases. Unable to reach a resolution, the Union requested that Mack's grievances be taken to arbitration. Mack, however, requested that he be represented by an attorney in light of his dislike for the Union agent assigned to represent him at arbitration. Mack's request for an attorney was denied, but a different union agent, Arthur B. Crutcher, Vice President of the Union, was assigned to represent him.

In August of 1988, an attorney, Kim G. Sims, notified the Union that she was representing Mack with regard to his arbitration hearing, and on September 9, 1988, Sims requested to be included in the selection of an arbitrator. On October 12, 1988, Crutcher received a letter from Mack advising him that Sims had been hired to represent Mack in the arbitration and requesting that all information regarding Mack's case be forwarded to Sims. In response to Mack's letter, Crutcher wrote Mack, stating as follows:

> Since you have made this request that Ms. Sims present your case, we are requesting specifically if you are disbarring the Local Union from presenting your cases and will use only officials from the Local Union as witnesses to testify.
>
> We, therefore, ask that you sign this letter releasing the Local Union of all of its duties, requirements, and obligations under the terms and provisions of the present contract with Malone and Hyde Company.

The bottom of Crutcher's letter contained a release, which Mack signed on November 16, 1988. Crutcher, in turn, notified Malone and Hyde that Mack had retained outside counsel.

In July of 1988, the AAA furnished panels of arbitrators to the representatives of both the Union and Malone and Hyde, who in turn selected separate arbitrators to hear the grievances. On October 14, 1988, the AAA sent letters to the Union and Malone and Hyde acknowledging their selections. In late October and early November of 1988, the AAA advised the Union and Malone and Hyde of the dates the arbitrators would be available for arbitration. In early December, the AAA requested information as to the current status of Mack's grievances from both the Union and Malone and Hyde. In response, Malone and Hyde wrote the Union on December 28, 1988, seeking clarification of the status of Mack's grievances. On January 12, 1989, the Union's attorney wrote Malone and Hyde stating as follows:

> [N]o action of [the Union] is to be construed as an abandonment of Mr. Mack's grievances. Neither should they be construed as acknowledging that the grievance has no merit. On the contrary, Mr. Mack desires to proceed to arbitration. He simply does not want a Union business agent representing him at the hearing. He has relieved the Union of any further obligations in the processing of his grievances and has retained an attorney, Ms. Kim G. Sims. . . .

On January 23, 1989, Sims wrote to Malone and Hyde to inquire about the grievance hearing. In response, Malone and Hyde, in a letter from its attorney dated

February 2, 1989, declined to acknowledge Sims' representation of Mack. On February 2, 1989, Malone and Hyde wrote the AAA stating that it was Malone and Hyde's position that it was relieved of any obligation to proceed further on the grievances.

On February 7, 1989, the Union was notified by the AAA that it would consider the matter closed unless an objection was filed. On April 5, 1989, the Union's attorney wrote the AAA stating that the Union had not withdrawn Mack's grievances and wished to proceed to arbitration. The letter noted that the grievant desired to have his own attorney process his grievance and that, despite the Union's consent, the Company had declined to arbitrate with Mack's personal attorney. In response to a request by the AAA for comments, Malone and Hyde asserted that it had no obligation to arbitrate Mack's grievances. In reply, the Union filed the lawsuit that is subject to the appeal at bar.

B. Lower Court Proceedings.

On May 12, 1989, the Union filed suit against Malone and Hyde pursuant to 29 U.S.C. § 185, alleging that Malone and Hyde refused to arbitrate grievances in violation of the CBA. The Union petitioned the Court to either compel Malone and Hyde to arbitrate or to decide the merits of the grievances. On October 8, 1991, the Union's Motion for Summary Judgment was denied, the Court concluding that Malone and Hyde was under no duty to arbitrate a grievance with an individual employee and his personal attorney, but determining that a fact issue existed as to whether the Union represented Mack and

whether the release signed by Mack constituted a formal rejection of Union representation.

At a hearing held on April 20, 1992, Judge Turner dismissed the Union's Complaint, ruling that Malone and Hyde acted properly in refusing to arbitrate with Mack and his attorney. The Court determined that since Mack was not a party to the CBA, he could not be a party to the arbitration, and any further processing of his grievance must be carried out by the Union. The Court further determined that issues as to whether the Union withdrew from or abandoned arbitration, whether the arbitration was time barred, and whether Malone and Hyde was entitled to equitable defenses are to be determined by an arbitrator.

Malone and Hyde filed a Notice of Appeal on July 24, 1992. The decision of the Court of Appeals, upholding the lower Court's ruling, was filed on May 11, 1994. A Petition for Rehearing and Rehearing *en banc* was denied on June 23, 1994. Malone and Hyde subsequently filed a Petition for Writ of Certiorari on September 17, 1994.

ARGUMENT

In Malone and Hyde's Petition for Certiorari, it argues that the rationale applied by the Court of Appeals, in affirming the District Court's Order referring Mack's grievances to arbitration, directly conflicts with applicable decisions of this Court. On the contrary, careful review of the Court of Appeals' decision attests to the fact that the Court's analysis and determination is entirely consistent with the rationale heretofore applied

by this Court. It is Malone and Hyde's contention that the District Court shirked its duty to determine "the arbitrability question", that is whether the parties agreed to arbitrate the dispute at bar. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 208-09 (1991); *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 651 (1986); *John Wiley and Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). In fact, after reviewing applicable CBA provisions, the Court of Appeals affirmed the District Court's determination that the parties had agreed to submit Mack's grievances to an arbitrator for determination.

Although the *AT&T Technologies* case is cited by Malone and Hyde as support for its contention that the District Court avoided its duty in the present case, the Union respectfully submits that the case in fact attests to the propriety of the District Court's determination and the subsequent affirmation by the Court of Appeals. In *AT&T Technologies*, this Court began its analysis by setting out four well-established principles governing arbitrability: (1) that "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit" (citing, *Steelworkers v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582 (1960)); (2) that the question of arbitrability, that is, whether a CBA creates a duty for the parties to arbitrate a particular grievance, is undeniably an issue for judicial determination (citing, *Warrior and Gulf, supra*, at 583); (3) that, in deciding whether the parties agreed to submit a particular grievance to arbitration, a Court is not to rule on the potential merits of the underlying claims (citing, *Steelworkers v. American Manufacturing Company*, 363 U.S. 564, 568 (1960)); and (4) that when a contract

contains an arbitration clause, there is a presumption of arbitrability in the sense that "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage" (citing, *Warrior and Gulf, supra,* at 582-83). The Court stated that the presumption is particularly applicable in the case of a broad arbitration clause (citing, *Warrior and Gulf, supra,* at 484-85). *AT&T Technologies, supra,* at 648-51.

In the *AT&T Technologies* case, the Court was asked to determine whether "because of express exclusion or other forceful evidence, the dispute over the interpretation of Article 20 of the contract, the layoff provision, is not subject to the arbitration clause." This Court held that the District Court erred in "ordering the parties to arbitrate the arbitrability question" and remanded the case back to the District Court for a determination of whether the contract's layoff provision was not subject to the contract's arbitration clause. *AT&T Technologies, supra,* at 652.

In its analysis of the dispute at bar, the Court of Appeals cited each of the principles this Court noted in its decision in *AT&T Technologies* as factors reviewed in its determination. The Court of Appeals next reviewed Article 13 of the CBA, citing its broad arbitration clause covering "any discharge, suspension, or dispute or controversy of any kind over the application of this agreement." The Court noted that the language contained in the arbitration provision was typical of a broad arbitration clause, strengthening the presumption favoring arbitrability. In light of a finding that the subject matter of

Mack's grievances pertaining to his discharge were contemplated under the CBA as issues subject to the CBA's arbitration provision, the Court of Appeals correctly concluded that the grievances should be decided by an arbitrator.

Despite Malone and Hyde's assertions to the contrary, the rationale employed by the Court of Appeals is in harmony with other decisions of this Court. The Court of Appeals has not asked the parties to "arbitrate the arbitrability question." Rather, it has exercised its duty to determine the parties' intent under the CBA and has concluded that Mack's grievances are subject to the contract's arbitration provisions. The Court of Appeals noted that, once it has determined that the subject matter of the dispute is properly arbitrable, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. *John Wiley and Sons, supra,* at 557. Malone and Hyde's alleged defenses of abandonment, termination, estoppel, and waiver, all based on events that arose out of Mack's initial grievances over his discharge, were properly left for the arbitrator to determine.

In its Petition, Malone and Hyde argues that the decision of the Court of Appeals is in conflict with this Court's opinion in *Warrior and Gulf, supra,* in which the Court stated that the grievance procedure is a part of the continuing collective bargaining process. *Warrior and Gulf, supra,* at 581. Malone and Hyde contends that it should not be required to arbitrate with the Union in light of the fact that it has lost its bargaining representation rights. Likewise, Malone and Hyde contends that the Court of Appeals' decision conflicts with this Court's

opinion in *Nolde Brothers, Inc. v. Bakery and Confectionery Workers Union, Local 358*, 430 U.S. 243 (1977), in which this Court "carefully reviewed contract provisions in order to determine whether arbitration obligations terminated with the contract's expiration." In fact, this Court recognized in the *Nolde Brothers* case that a parties' obligation to arbitrate does not automatically cease upon termination of the CBA. *Nolde Brothers, supra*, at 252.

Despite Malone and Hyde's argument that the Court of Appeals failed to closely examine the CBA's provisions pertaining to termination of obligations under the contract, its decision indicates that the Court of Appeals did indeed consider the termination provisions, but that it questioned whether the termination language covered grievance procedures ongoing when the agreement terminated. In deciding to leave the matter to the arbitrator for determination, the Circuit noted that doubts as to whether a dispute is covered by an arbitration clause should be resolved in favor of coverage. In addition, the Court of Appeals cited decisions of this Court recognizing that a party's obligation to arbitrate does not automatically cease upon termination of a CBA and establishing the presumption that disputes arising under a CBA are arbitrable even after the CBA itself is terminated.

The Court of Appeals specifically addressed Malone and Hyde's contention that it is no longer bound by the CBA's arbitration clause in light of this Court's *Nolde Brothers* decision by distinguishing the facts addressed in that decision from those at bar. The Court noted that the *Nolde Brothers* decision pertained to a dispute that actually arose after the CBA had terminated. In contrast, the

dispute underlying Mack's grievances arose in 1988, while the CBA was still in effect. The Court reasoned that the presumption that disputes arising under a CBA are arbitrable even after the CBA itself is terminated should even be stronger in the case of Mack's grievances. A party who wrongfully resists the arbitration process until expiration of the contract ought not be rewarded for its conduct.

Finally, Malone and Hyde argues that the Court of Appeals' determination, that, regardless of whether the release executed by Mack is a "collateral agreement", the construction of the release is a question for the arbitrator not the Court, is in conflict with the Second Circuit cases of *Peerless Imports, Inc. v. Wine, Liquor and Distillery Workers Union, Local 1*, 903 F.2d 924 (2d Cir. 1990) and *Rochdale Village, Inc. v. Public Service Employees Union, Local 80*, 605 F.2d 1290 (2d Cir. 1979). Malone and Hyde further argues that the Court's opinion conflicts with the Tenth Circuit's decision in *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado*, 535 F.2d 598 (10th Cir. 1976). In fact, no such conflicts exist. The issues addressed in each of the cases cited by Malone and Hyde are readily distinguishable from those addressed in the case at bar.

In determining that the construction of the release at issue should properly be left to the arbitrator, the Court of Appeals relied on its decision in *Amalgamated Clothing Workers v. Ironall Factories Company*, 386 F.2d 586 (6th Cir. 1967). In *Amalgamated Clothing Workers*, the Court of Appeals, confronted with a separately negotiated settlement agreement between the employer and the union settling particular grievances of specified individual

employees, noted that "the parties had agreed to submit to arbitration any complaint or dispute arising out of or relating to the provisions of the CBA, or the interpretation thereof," and determined that the construction of the settlement agreement concerned the correct interpretation of the CBA and was, consequently, a properly arbitrable issue.

As the appeals court has noted, the *Peerless* and *Rochdale* cases, in which Courts held that agreements collateral to CBA's were properly examined at the District Court level, pertained to factual situations distinguishable from the one at bar and are unpersuasive. In the *Peerless* case, the Second Circuit held that an agreement settling a single labor dispute constituted a collateral agreement not to arbitrate and that construction of the agreement was properly before the Court. The Circuit concluded, however, that the arbitration clause in the existing CBA did not cover the grievance in question. Accordingly, the only existing basis for arbitration was an oral agreement to arbitrate the particular claim of the individual employee. The Court in *Peerless* specifically relied on the narrow scope of the arbitration agreement in its holding. In contrast, the present dispute pertains to grievances over Mack's suspension and discharge, disputes which are unquestionably subject to the CBA's arbitration clause.

In the *Rochdale* case, the Second Circuit addressed the issue of whether parties to a CBA terminated the agreement by entering into a side agreement. The Court held that such matters were beyond the scope of the CBA's arbitration clause, and therefore, were properly subject to Court determination. In the present dispute, Mack's

release does not concern termination of the entire agreement, only the arbitration of his grievances and is not collateral to the CBA because it relates directly to the CBA's arbitration and grievance provisions.

Finally, the *Reid Burton* case cited by Malone and Hyde is distinguishable from the present dispute. In the *Reid Burton* case, the Tenth Circuit considered the issue of whether a union, because of certain pleading and procedural tactics employed during District Court proceedings, were prevented by the equitable doctrines of waiver, estoppel, repudiation, or laches from asserting the arbitrability of the company's complaint. The Court held that because the conduct fell within its control, that is, because the misconduct occurred during the judicial proceedings themselves, the equitable defenses should have been considered by the Court. *Reid Burton, supra,* at 603. In concluding its discussion, the Tenth Circuit made it clear, that although it had concluded that the Court could appropriately consider equitable defenses arising out of conduct that occurred "solely during the course of the judicial process", the general rule is that such equitable defenses should be submitted to an arbitrator for determination. *Reid Burton, supra,* at 604. The *Reid Burton* case, in fact, attests to the soundness of the Court's decision in the case at bar.

Not only does the Court of Appeals' decision in the present case fail to establish a conflict between the Circuits, it is consistent with decisions throughout the Circuits addressing similar issues. *See,* for example, *Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 v. Interstate Distributor Company,* 832 F.2d 507 (9th Cir. 1987) (dispute over termination of the CBA held to be

subject to arbitration); *International Brotherhood of Electrical Workers Local 1228 (AFL-CIO) v. WNEV-TV, New England Television Corporation*, 778 F.2d 46 (1st Cir. 1985) (whether procedural efforts were defective was for the arbitrator to decide); *Ottley v. Sheepshead Nursing Home*, 688 F.2d 883 (2d Cir. 1982) (whether a grievance had been waived was appropriate issue for arbitrator's determination); *Beer, Softdrink, etc. Local 744 v. Metropolitan Distributors, Inc., et al.*, 763 F.2d 300 (7th Cir. 1985) (it was for the arbitrator to decide whether party had waived its right to arbitration); *Automotive, Petroleum and Allied Industries Employees Union Local 618 v. Town and Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983) (whether party complied with the CBA grievance procedure was question submitted to the arbitrator); *Local 406, International Union of Operating Engineers, AFL-CIO v. The Austin Company*, 784 F.2d 1262 (5th Cir. 1986) (arbitrator should determine whether the party had met the requirements for taking a grievance to arbitration); *Local Union 370, International Union of Operating Engineers v. Morrison-Knudsen Company, Inc.*, 786 F.2d 1356 (9th Cir. 1986) (the Court stated that, once it is determined that the parties were obligated to submit the subject matter of the dispute to arbitration, the procedural questions growing out of the dispute, including defenses of waiver, estoppel, and mootness, are properly left to the arbitrator for determination); *see also, International Union of Operating Engineers Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972); *Alabama Power Company v. IBEW Local 391*, 612 F.2d 960 (5th Cir. 1980). The decision of the Court of Appeals not only fails to create the conflict among the Circuits as asserted by Malone and

Hyde, it is harmonious with numerous court decisions from around the Circuits addressing similar issues.

CONCLUSION

The Union respectfully submits that the underlying issue to be construed by the Court is whether or not Mack's suspension and a discharge are subject to the arbitration clause of the CBA. Having decided that, all other issues are to be decided by the arbitrator. Accordingly, the Union prays that the Court will deny Malone and Hyde's Petition for Writ of Certiorari.

Respectfully submitted,

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